No. 82-1503

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH EVANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Does the policy of the Federal Rules of Evidence, Rule 404 require exclusion of evidence of extrinsic crimes in ordinary and recurring circumstances such as presented in this case?

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Petitioner, by his attorneys, petitions for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit affirming his conviction in the United States District Court for the Eastern District of Missouri in the instant case.

OPINIONS BELOW

The case was decided by the Court of Appeals for the Eighth Circuit by opinion dated January 6, 1983, *United States* v. *Evans,* _____ F. 2d _____ (8th Circuit No. 82-1559). The opinion is reproduced in the Appendix. No opinion was filed in the District Court.

JURISDICTION

Judgment of the Court of Appeals for the Eighth Circuit was entered on January 6, 1983. This Court's jurisdiction is invoked under 28 U. S. C. §§ 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States. "... Nor shall any person be ... deprived of life, liberty, or property, without Due Process of Law...."

FEDERAL RULES OF EVIDENCE INVOLVED

The case involves both Rules 403 and 404 of the Federal Rules of Evidence:

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim; Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or

evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT

Petitioner was one of five individuals named in a two count indictment charging violations of Title 21, U. S. C. §§ 841(a)(1) and 846 involving dealings on September 24, 1980 in significant amounts of marijuana made available by the St. Louis Police Department and the Drug Enforcement Administration. None of Petitioner's co-defendants proceeded to trial in the case, all entering pleas of guilty. One, Edward England, was the major witness for the Government at Petitioner's trial. T. 73-145. The jury returned verdicts of guilty on March 24, 1982 and on April 30, 1982. Petitioner was sentenced to incarceration for a period of three years on each of the two counts to run concurrently. Appeal was taken resulting in the opinion of the Court of Appeals for the Eighth Circuit reproduced in the Appendix which we ask this Court to review.

Unlike most of the usual cases involving the enforcement of drug laws, the undercover policeman in this case posed as a major seller of drugs rather than a purchaser. In addition, England, who testified that he sold marijuana to—not purchased it from—Petitioner, was promised consideration by the Government on his Motion to Reduce Sentence in return for his testimony at Petitioner's trial. T. 137.

It appears that the police had come into possession of approximately five hundred pounds of marijuana which was stored in a hanger at the Spirit of St. Louis Airport. Officer Zambo, the undercover policeman, met with Co-Defendants Richmond Miller and Charles Cargile on September 23, 1980 at a hotel in St. Louis to discuss the sale of the police marijuana. Arrangements were made to gather interested purchasers and to consummate the transaction on the following day. Cargile contacted Edward England, a resident of Southern Illinois, who interested his friend, Phillip Wright, also from Southern Illinois, in the transaction. England testified that he also contacted Petitioner in Chicago who arrived at his home on the next day. Five individuals not including Petitioner, viz., Zambo, his informer, Miller, Cargile and another prospective purchaser, Ronald Boles, drove to the airport and inspected the marijuana. Cargile apparently agreed to consummate the transaction and, needing time to get his people and his money together, made arrangements to meet later on the same day at a St. Louis shopping mall. T. 150 et seq.

Surveillance officers identified Cargile, England and Petitioner proceeding to the mall in Petitioner's car. Upon arrival Petitioner left the car, turning it over to England, and entered the shopping area where he spent the ensuing period of time shopping and eating. T. 193, 213-214. Meanwhile, England drove the car with Cargile as a passenger to the airport. Wright arrived in another vehicle; Zambo, Miller and the informant in a third car. Cargile gave Zambo $58,000.00 of his own money, $10,000.00 he obtained from a brown shoulder bag in the car, later identified as Petitioner's, and some additional money totalling $82,000.00. T. 153. The individuals present then loaded 148 pounds of marijuana into the automobile driven by Wright and 127 pounds of marijuana into the trunk of Petitioner's car, then being driven by England. T. 156. Wright and England, each driving alone, then returned to the mall in those vehicles, Cargile this time travelling with Zambo, Miller and the informant in their car. England gave Petitioner the keys to his vehicle, then entered Wright's car as Petitioner entered his

own. As the two cars were driving off they were stopped, all of the individuals involved were arrested and the marijuana in the trunks was seized. T. 193-4.

There was also proof of some post-arrest remarks of Petitioner tending somewhat to indicate his knowledge of marijuana in the trunk. T. 161, 183, et. seq. The prosecution relied and conviction depended, however, upon the testimony of England for evidence of Petitioner's agreement to deal in the drug, his purpose in going to St. Louis and his knowledge of the scheme. At the trial there was vigorous cross-examination of England by counsel for Petitioner going directly to his credibility. In the course of his testimony England was permitted to state over objection of the defense that the reason he contacted Petitioner in connection with the opportunity to purchase the marijuana had to do with a previous transaction involving 60 pounds of marijuana, which England had sold to Petitioner during the preceding summer. In view of the importance of this testimony to the contention we raise, we set it out below:

"Q. (By Mr. Dowd) [The Prosecutor] Mr. England, prior to calling the defendant Evans on September 22 of 1980 had you had a marijuana transaction with him?

A. Yes, sir.

Q. And when was that approximately?

A. I believe it was in the summer. The same one I indicated that I did with Cargile.

Q. Okay. You had gotten marijuana from Cargile?

A. Right.

Q. And you sold it to this defendant?

A. Right.

Q. Is that why you called him this time in September of '80?

A. Yes, sir." T. 84-5.

* * *

"Q. (By Mr. Dowd) Mr. England, you testified before that you sold the defendant marijuana a couple of months prior to September of 1980?

A. Right.

Q. How much did you sell him?

A. Oh, approximately sixty pounds maybe." T. 114.

Apart from England's testimony there was no other evidence of that prior sale. It is the admissibility of that evidence which we ask this Court to review.

REASON FOR GRANTING THE WRIT

Rule 404(b) of the Federal Rules of Evidence represents the most recent solution to the evidentiary problem, long persistent in the administration of criminal justice, of regulating and attempting to define with a precision the circumstances under which evil acts committed in a defendant's past shall be admitted into evidence in the course of a trial for specific wrongdoing. The problem is as perplexing as it is ancient. The first sentence of Rule 404(b) is intended to protect defendants and to insure that individuals will not be convicted for specific instances of wrongdoing solely because they have been bad men. The second sentence of Rule 404(b) attempts to allow such evidence in instances in which it serves a *bona fide* purpose necessary to the fair and full presentation of the facts relating to the specific charges of the indictment. Rule 403 provides the further protection that such evidence will not be permitted when its value pales in comparison to the harm it produces upon the likelihood of a fair trial. These are all fundamental considerations, the balanced resolution of which is critical to the administration of the criminal law. It is our contention that decisions like the present—they are legion—permit the second sentence of Rule 404(b) to swallow whole the protections embodied in the other two provisions. The point runs deep; it involves the basic integrity of the system. Judgments of conviction predicated upon a defendant's reputation, prior record, or evil nature and not upon proved guilt of specific

charges defile a legal system which permits them. This Court has not spoken to the maintenance of this critical balance at least since *Michelson* v. *United States,* 335 U. S. 469. The instant case, we respectfully submit, presents that opportunity.

The Court below set out a tripartite test of admissibility derived entirely appropriately from the text of the rules and from prior decisions of the Courts of Appeals in several circuits. It held:

> "In previous decisions we have set out the prerequisites that must be met for the admission of evidence of prior criminal or wrongful acts. These requirements track the pertinent portions of the Federal Rules of Evidence, Rule 404(b) and 403. A trial judge acts within his sound discretion in admitting evidence of prior wrongful acts when (1) the evidence is relevant to an issue in question other than that of the character of the defendant, (2) there is clear and convincing evidence that defendant committed the prior acts, and (3) the potential unfair prejudice of the evidence does not substantially outweigh its probative value." [Footnote omitted.]

The opinion, however proceeds from that statement of the law to approve the admission of the prior offense testimony in this case. In doing so, the Court reflects a construction of the three part test which we believe is far from that intended and which courts the very dangers against which the rules were designed to protect.

The first sentence of the rule permits such evidence to be introduced on an issue other than the character of the defendant and his proclivity to commit the offense charged in the indictment. In this case it was apparent early on that the jury's decision was going to rest on whether it believed the testimony of England beyond a reasonable doubt—for if that testimony were believed there could be no question of Petitioner's guilt. Defense counsel quite appropriately attacked England's credibility and in the course of that attack sought to make of him a long term professional drug offender. England indeed admitted a course of dealing in drugs from which he derived substantially

his entire income over a four year period. The District Judge suggested the cutting edge of the testimony concerning the prior transaction:

> "... [H]e is entitled to show that one of the persons he dealt with regularly is this defendant here because you're trying to contrast the amateur status of the defendant and the professional activities of the witness...." T. 143.

The Court below took that purpose to fall within the language of the second sentence of Rule 404(b). In fact, the "amateur status" of the Defendant precisely relates to his character and to the purpose forbidden by the first sentence of the same rule.

The interpretation given by the Court below to the second part of the test is equally unsatisfying. The "clear and convincing" evidence in the instant case consists solely of the totally unsupported testimony of England, the accomplice, Co-Defendant, drug seller witness. The Government, successfully in the Court below, contended that the clear and convincing standard related entirely to ambiguity and specificity and not to credibility. We concede that England's testimony was about his prior sale of marijuana to Evans was specific and unambiguous; that is to say, it was clear. We quarreled in the District Court and in the Court of Appeals and we quarrel here with any characterization of that testimony as convincing in view of its source and the total absence of any corroboration to support it. Effectively, the concept subsumed in the word "convincing" in the test has been read out of the equation.

The third portion of the three part test, the balance between probative value and cost in prejudice, also was not met in the instant case. Few juries begin deliberations with unanimity and it is in the give and take of deliberation that the collective judgment upon which we depend is formulated. Clearly in a close case on the facts England's position as a professional drug seller may well have been influential, but not nearly so influential as Evans' position as a repeated offender. The jury deliberations may well have turned from an examination of the reliability of England's testimony concerning the crimes charged in the indictment to an evaluation of the Defendant and the likelihood that such a man as he would

become deliberately involved in those crimes. The entire protective purpose of the rules has been perverted.

The construction and interpretation of Rule 404 and its application to the facts of specific cases has spawned much litigation and many opinions from the several circuits. See e.g., *United States* v. *Dothard,* 666 F. 2d 498 (11th Cir., 1982), *United States* v. *Manafzadeh,* 592 F. 2d 81 (2nd Cir., 1979), *United States* v. *Beechum,* 582 F. 2d 898 (5th Cir., 1978) (*en banc,* 5 judges dissenting) and *United States* v. *Scholle,* 553 F. 2d 1109 (8th Cir., 1977). It is not our purpose here to review, analyze, and catalog all of those decisions or the considerable volume of professional literature touching on the question. That might well be the function of a brief on the merits. Perhaps the reason the issue has proved so troublesome lies in the fundamentally illogical nature of the beneficent and protective purpose of any rule in this area. Justice Jackson perhaps best pointed out that illogic:

> "The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against the particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Michelson* v. *United States,* 335 U. S. 469, 475. [Footnotes omitted].

The policy to which Justice Jackson adverted has come to be relied upon as an important safeguard in our criminal justice system. Its values are those of the Due Process Clause of the Fifth Amendment and though its illogic may be recognized, its firm experiential base cannot be denied. In the hope that this Court will fill the need for an authoritative resolution of these fundamental, sensitive and important issues, we respectfully petition for the issuance of a Writ of Certiorari.

CONCLUSION

For the reasons discussed above we respectfully submit that this Court ought to issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review that Court's judgment in the instant case.

Respectfully submitted,

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March, 1983

UNITED STATES COURT OF APPEALS
For The Eighth Circuit
No. 82-1559

UNITED STATES OF AMERICA,
Appellee,

vs

JOSEPH EVANS,
Appellant

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: October 14, 1982

Filed: January 6, 1983

Before BRIGHT and ARNOLD, Circuit Judges, and HUNTER,* Senior District Judge.

HUNTER, Senior District Judge.

Defendant, Joseph Evans, was charged along with four others, Charles Cargile, Edward England, Richmond Miller, and Phillip Wright, with violating federal narcotics laws. Evans' four co-defendants pled guilty to the charges and he stood trial alone.[1] A jury convicted him on counts one and four of the indictment; of conspiring to possess with intent to distribute approximately 500 pounds of marijuana in violation of Title 21, United States Code, §§ 841 and 846, and of possessing with intent to distribute approximately 127 pounds of marijuana in violation of Title 21, United States Code, § 841, respectively.

* The Honorable Elmo B. Hunter, Senior United States District Judge for the Western District of Missouri, sitting by designation.

[1] The Honorable Clyde S. Cahill, Sr., United States District Judge for the Eastern District of Missouri, presiding.

Evans appeals his conviction on two grounds: (1) that the jury lacked sufficient evidence upon which to convict him, and (2) that the district judge erred in allowing the government to present evidence of his prior criminal or wrongful acts. After considering the challenges of defendant and reviewing the record below, we affirm.

The nature of defendant's claims requires us to set out in some detail the evidence elicited at trial. The government based its case primarily on the testimony of Detective Zambo, an agent for the Drug Enforcement Administration (DEA), and Edward England, one of the initial codefendants in the case. Detective Zambo testified concerning a marijuana transaction that he had participated in while acting in an undercover capacity and to conversations he had had with defendant after the latter's arrest. Edward England related defendant's involvement in the same transaction. Also relied on, but to a lesser extent was the testimony of two additional DEA agents.[2]

An informant put Detective Zambo in contact with Richmond Miller in September of 1980. A meeting was arranged, and Detective Zambo and the informant met with Miller and Charles Cargile on September 23, 1980, at the Drury Inn in St. Louis. The meeting was held to discuss a marijuana transaction. No marijuana was sold at the meeting, although Cargile wanted to purchase a sample at that time to show "his people" coming in from Alabama and Illinois. They scheduled another meeting for the next day to further discuss the sale and to check the quality of the marijuana.

Cargile called Edward England at his home in Petersburg, Illinois during the evening of September 22, 1980. He told England that he had a deal in St. Louis where England could buy all the marijuana he wanted. England had been involved in a marijuana transaction with Cargile during the summer of the same year.

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[2] A third DEA agent was called by defendant and testified concerning the surveillance of the defendant. Evans also called his employer as a character witness.

After hearing from Cargile, England talked to Phillip Wright who lived in the same town, and called defendant in Chicago to ask them if they were interested in buying some marijuana. Over the objection of defendant, England explained that he called Evans because Evans had also been involved in the marijuana deal between Cargile and England the previous summer.

Evans arrived at England's home during the afternoon of September 23, 1980, driving a beige Buick. England drove defendant's car to St. Louis and Wright followed in a car that England had him rent. The three checked into the same Drury Inn where Detective Zambo had met with Cargile and Miller, and where the latter two were staying. On arrival in St. Louis the three contacted Cargile about the deal. He told them that it was to occur the next day, September 24, 1980.

On the 24th Agent Zambo, the informant, Miller, and Cargile all met again to discuss the deal. Cargile indicated that he wanted to buy 500 pounds of marijuana, 300 pounds of which were for his buyers from out of town. The foursome then drove to a St. Louis airport to view the marijuana located in a hangar. Being satisfied with the quality of the marijuana the group returned to the motel so that Cargile could get his money and drivers together.

Upon their return to the motel Miller went to Cargile's room to get their money and Cargile went down the hall to England's room to confirm that the deal was on. When Cargile returned from the room he told Detective Zambo that his drivers were ready. During this same period England, Wright, and Evans sat in England's room and counted their money to make sure they had enough to purchase the 300 pounds of marijuana. They had approximately $80,000 between them; Evans had brought half of that amount.

Shortly thereafter Cargile, England, Wright, and Evans drove in Evans' Buick and Wright's rented car to a St. Louis mall where they were to rendezvous with Detective Zambo and

the informant. England told Evans to remain at the mall and that he would pick him up after "it was loaded." Everyone else proceeded to the airport hangar.

At the hangar approximately 125 pounds of marijuana was loaded into the trunk of defendant's car and 150 pounds was loaded into the rented car. England counted out $82,000, $10,000 of which came from a paper sack taken from a brown shoulder bag. England and Wright then drove the two cars back to the mall to pick up defendant.

Other DEA agents kept defendant under surveillance while he waited at the mall. During that time Evans made a purchase, ate, and then waited at the curb for England and Wright to return.

Upon their return to the mall England gave Evans the keys to the Buick, told him that the car was ready to go, and then got in Wright's car for the trip home. Evans was not going through Petersburg on his return to Chicago.

As the two cars exited the mall parking area agents stopped them, seized the marijuana in the trunks of both cars, and arrested the three occupants. Defendant was read his rights, and then taken to a St. Louis County police office. The others were taken to the local offices of the DEA. Among the items taken from Evans at the time of his arrest was approximately $700.

Evans was taken to the DEA offices the next morning, September 25, 1980, for processing. At the offices Detective Zambo again advised him of his rights and defendant indicated that he understood them. He did not, however, understand the charge against him. Detective Zambo explained that he was charged with conspiracy and with possession of marijuana with the intent to distribute it because he had more marijuana in his possession than deemed necessary for personal use.[3] Evans

[3] According to Detective Zambo an ounce of marijuana contains the equivalent of fourteen marijuana cigarettes. The amount of marijuana taken from Evans' car trunk, 125 pounds, could produce approximately 28,000 marijuana cigarettes.

replied that "maybe we're just heavy smokers." Finally, Evans asked the detective if he would get his car back and identified the beige Buick as his car. When Detective Zambo said no that it was being seized as a vehicle used to transport marijuana, Evans said that he figured as much.

That same afternoon Detective Zambo again saw Evans at the Magistrate's Office for the setting of bond. Bond was set at $25,000. Detective Zambo overheard Evans comment that he didn't know how he was supposed to pay that amount when "they got all my money already."

Detective Zambo again spoke with Evans on September 26, 1980, when Evans was at the Marshal's Office claiming as his the clothes that were removed from the brown shoulder bag. He asked whether the shoulder bag would be returned to him. Again the detective told him that it was being seized because money used to purchase marijuana was taken from it. Evans said alright, signed the receipt for the property, and left.

England and defendant had at least three other contacts prior to defendant's trial. Sometime after their arrest in St. Louis but before Thanksgiving England drove to Chicago to see Evans. Evans was not home so England left him a note asking him to call. Evans did call shortly thereafter, but England was unable to recall any of the specifics of the conversation. England called Evans on Thanksgiving. Evans told England that he had been indicted on the St. Louis matter, and that England should check to see if he had been also. During the conversation Evans also told England that he could beat the charge if no one testified against him. Evans called England the day before his trial was to begin to persuade England not to testify against him. He told England that the most the judge would do to him if he did not testify would be to find him in contempt of court and place him in jail for the duration of the trial, but that the trial would last only a few days.

Sufficient Evidence

Evans claims that the foregoing evidence was insufficient to establish his guilt beyond a reasonable doubt. He does not challenge the existence of a conspiracy to possess and distribute marijuana. Instead Evans challenges the proof of his knowing participation in the conspiracy. His main contention is that the testimony of Edward England was too biased to support his conviction. Furthermore, the rest of the evidence against him failed to establish more than his knowing and associating with certain conspirators, also insufficient to convict him of the conspiracy charge.[4]

To convict one of criminal conspiracy the government must show that the individual entered an agreement with at least one other person, that the agreement had as its objective a violation of law, and that one of those in agreement committed an act in furtherance of the objective. United States v. Schmaltz, 562 F. 2d 558, 559 (8th Cir. 1977), *cert. denied,* 434 U.S. 957 (1978). The only element of a criminal conspiracy at issue on this appeal is the government's proof that Evans did join in the conspiracy.

The government in large measure relied on the testimony of Edward England in establishing Evans' involvement in the conspiracy. It was the only direct evidence linking defendant to the conspiracy. Evans challenges the heavy reliance on England's testimony. He asserts that England's desire to reduce his own three year sentence on the conspiracy and possession charges rendered his testimony unreliable and therefore insufficient to prove Evans' participation. We disagree.

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[4] Evans further claims that his conviction for possession with intent to distribute marijuana must also be dismissed on insufficiency of evidence grounds. He argues that when the evidence fails to support a conviction for conspiracy, as it does here, then a conviction on the underlying substantive count should be set aside. Our decision makes it unnecessary to rule on the merits of this argument.

The testimony of an accomplice is not per se unreliable. Both the Supreme Court, in Caminetti v. United States, 242 U.S. 470, 495 (1917); and this Circuit most recently in United States v. Anderson, 654 F. 2d 1264, 1268 (8th Cir. 1981), *cert. denied,* 102 S. Ct. 978 (1982), have recognized the propriety of using and relying upon the testimony of an accomplice or conspirator to prove another's connection to the conspiracy. The real issue here is not admissibility, but credibility. Credibility, i.e., the decision as to the appropriate weight to be accorded the testimony of a witness, rests with the jury.

Tainted witnesses have often supplied testimony crucial to the government's case. In a recent case both government witnesses admitted involvement with the defendants in a conspiracy to distribute a controlled substance. One of the witnesses was not indicted and the other pled guilty and received a thirty-three day sentence. Their testimony provided the only evidence against one of the defendants. United States v. Anderson, 654 F. 2d at 1267, 1268. In another case the sole government witness was a large scale narcotics seller who had been recently paroled from a sentence on previous charges. For his testimony the government agreed not to further prosecute him for his past drug related crimes even though he was named in twenty-five counts of the present indictment. The government further agreed to relocate and sustain him. His testimony, and taped phone conversations between him and the defendant were the basis of the latter's conviction. United States v. Losing, 560 F. 2d 906, 910-912 (8th Cir.), *cert. denied* 434 U.S. 969 (1977). In both cases the juries were made aware of the witnesses' incentives to testify. We found sufficient evidence in each case to support the jury's decision to convict.

As in the cases above, the jury that convicted Evans was aware of those facts that would tend to diminish the credibility of England. The jury knew of England's history of illegal drug activity, his participation in the present conspiracy, his plea of guilty to and sentence of three years on charges in the same indictment, and his hope for a reduction in his sentence by cooperating with the government. The government had offered

to inform the court of England's cooperation in testifying against Evans and had promised not to block a motion by England for a reduction of his sentence. Furthermore defendant does not claim and there is no indication in the record that he was prevented from bringing any other items to the jury's attention that would adversely reflect on England's credibility. We can find no error as a matter of law in the jury's consideration of the testimony of Edward England. As we noted in *Williams,* "these were matters which might influence ... [a witness'] testimony. They would not, however, of themselves make ... [his] testimony so legally unsubstantial or ... [his] credibility as a witness so legally infirm as to require reasonable doubt to be recognized as a matter of law." Williams v. United States, 328 F. 2d 256, 259 (8th Cir.), *cert. denied.* 377 U.S. 969 (1964).

Evans contends that England's testimony was legally unsubstantial because it was uncorroborated. Contrary to the assertion of defendant a conspirator's testimony does not always require corroboration. As a matter of law the testimony of an accomplice is not "of such unsubstantiality or such infirmity on interest or character as to be insufficient as a basis to convict without corroboration. A conviction can properly rest on the uncorroborated testimony of an accomplice if it is not otherwise incredible or unsubstantial on its face." Williams v. United States, 328 F. 2d at 259, and cases cited.[5] *See* United

[5] In *Williams* the crucial testimony against the defendant was provided by an accomplice. The accomplice and the defendant were arrested as they disembarked from a flight. A search of the two discovered heroin on the witness and nothing on the defendant. The accomplice, however, was not prosecuted, and instead testified against the defendant. The only corroboration of her testimony that the defendant had thrust the heroin package down the front of her dress as they proceeded through the airport was the testimony of an agent who said that he saw the defendant move his hand toward the testifying accomplice, but he could not see what was in the defendant's hand. Based on this testimony the defendant was convicted. Williams v. United States, 328 F. 2d at 258.

States v. Anderson, 654 F. 2d at 1268. England's testimony was not incredible or unsubstantial on its face. He explained why he called Evans. The two of them had been involved in a marijuana purchase during the previous summer. His testimony also provided the jury with a plausible reason for Evans' presence in St. Louis. Furthermore his recitation of the transaction process certainly did not hint of the incredible. Reviewing the testimony of England we can not say as a matter of law that it was incredible. The jury could reasonably have believed that Evans conspired with England and others to purchase marijuana for distribution.

Our conclusion is bolstered by other corroborative evidence in the record. Evans was seen with England and Cargile at the mall by at least three testifying agents. The trunk of Evans' car was loaded with marijuana which was paid for at least in part by money taken from a shoulder bag belonging to Evans. The shoulder bag was also in the car when he was stopped. England returned Evans' car to him and Evans was driving in tandem with England and Wright when both cars were stopped and all three were arrested. When Detective Zambo explained the charge against Evans to him Evans only response was that "maybe we are just heavysmokers." Evans was also not surprised when informed that his car and shoulder bag were being confiscated because of their connection with the marijuana transaction. Finally Detective Zambo overheard Evans' comment that "I don't know how they expect me to make $25,000 bond. They got all my money already."

Evans argues that when the totality of the evidence is considered it proves nothing more than his association with some of the conspirators. He claims he was in St. Louis to vacation. He was not at any of the meetings to discuss the deal, nor was he at the hangar when the cars were loaded. Moreover, his name was never mentioned by any of the conspirators at any of these times to any of the agents. Furthermore, he argues that the DEA failed to trace any of the money used to purchase the marijuana to him. They did not run a fingerprint check on the money or its container nor did they check any of

his bank records. He maintains that just because part of the money came from his shoulder bag does not mean that he put the money there. He also argues that if he had been involved in a $40,000 drug deal he would not have stayed behind at the mall, and he certainly would not have been as calm while he waited. Finally he maintains that his comment about not being able to afford bond because the officers already had his money referred to the $700 that he brought for his vacation and which was taken from him upon his arrest.

It is true that mere association with conspirators or knowledge of a conspiracy is not sufficient to convict one of conspiracy. United States V. Scholle, 553 F. 2d 1109, 1118 (8th Cir.), *cert. denied,* 434 U. S. 940 (1977). It is also true, however, that " 'once the government has established the existence of a conspiracy, even slight evidence connecting a particular defendant to the conspiracy may be substantial and therefore sufficient proof of defendant's involvement in the scheme.' " United States v. McCarty, 611 F. 2d 220, 223 (8th Cir. 1979), *cert. denied,* 445 U. S. 930 (1980), *citing,* United States v. Cox, 580 F. 2d 317, 323 (8th Cir. 1978), *cert. denied,* 439 U. S. 1075 (1979), *quoting,* United States v. Overshon, 494 F. 2d 894, 896 (8th Cir.), *cert. denied,* 419 U. S. 853 (1974). The government need not dispel every possible theory of honest behavior to obtain a conviction but its evidence must be sufficient to convince a jury beyond a reasonable doubt of the defendant's guilt. United States v. Nelson, 603 F. 2d 42, (8th Cir. 1979); United States v. Scholle, 553 F. 2d at 1119.

In reaching its decision to convict Evans the jury had before it not only the direct testimony of England and the DEA agents, but also the arguments and defenses of Evans. The jury chose to believe the case presented by the government: that Evans knowingly came to St. Louis to conspire to obtain and did obtain marijuana with the intent to distribute it. Having reviewed the evidence in a manner most favorable to the government, Hamling v. United States, 418 U. S. 87, 124

(1974); Glasser v. United States, 315 U. S. 60, 80 (1942); and accepting as reasonable all inferences from the evidence that would tend to support the verdict below, United States v. Littlefield, 594 F. 2d 682, 684 (8th Cir. 1979), we find the evidence sufficient to support the decision of the jury.

Prior Misconduct Testimony

In his other challenge Evans claims error in the admission of testimony as to his prior wrongful acts.[6] England testified over defendant's objection, that he and Evans had been involved with Cargile in a previous marijuana purchase during the summer of 1980. The court below allowed the testimony to explain why England called Evans concerning the marijuana purchase involved here. Defendant now raises several objections to the ruling. He argues that the testimony was irrelevant to the charges against him, that the court failed to determine whether the evidence was clear and convincing that he had participated in the prior transaction, and that the court failed to balance the probative and prejudicial values of the evidence. He concludes that a proper weighing of the values would lead to a finding of overwhelming prejudice and a refusal to admit the prior act testimony.

In previous decisions we have set out the prerequisites that must be met for the admission of evidence of prior criminal or wrongful acts. These requirements track the pertinent portions

[6] The government also sought to introduce evidence of a drug deal involving England and Evans that occurred after the St. Louis trip. The court, on learning of the government's intent, refused to allow England to be questioned regarding the subsequent transaction. Although Evans raises the fact of the government's attempt to introduce the evidence there is no basis for finding error. The jury heard nothing pertaining to the later transaction since the entire discussion occurred before the bench and out of their hearing.

of the Federal Rules of Evidence, Rule 404(b) and 403.[7] A trial judge acts within his sound discretion in admitting evidence of prior wrongful acts when (1) the evidence is relevant to an issue in question other than that of the character of the defendant, (2) there is clear and convincing evidence that defendant committed the prior acts, and (3) the potential unfair prejudice of the evidence does not substantially outweigh its probative value. United States v. Young, 618 F. 2d 1281, 1289 (8th Cir.), *cert. denied,* 449 U.S. 844 (1980); United States v. Scholle, 553 F. 2d at 121. Broad discretion is afforded the trial judge in deciding whether to admit wrongful act evidence and his decision will not be overturned without a clear showing that the requirements have not been met. United States v. Young, 618 F. 2d at 1289; United States v. Jardan, 552 F. 2d 216, 219 (8th Cir.), *cert. denied,* 433 U.S. 912 (1977).

Evans first contends that England's testimony was not relevant to any issues in the case. The prior act testimony was elicited to explain why England called Evans in the first place about the marijuana deal. In *United States* v. *Scholle,* we allowed evidence of a similar nature in order to complete the story for the jury. A coconspirator turned government witness was allowed to testify regarding a prior drug transaction that he had participated in and that the defendant had financed. The testimony served to explain why the witness had again ap-

[7] Rule 404(b) directs federal courts not to admit evidence of other crimes, wrongs, or acts for the purpose of proving the character of a defendant. Evidence of other crimes, wrongs, or acts may be admissible for other purposes; such as for proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" on the part of the defendant. Rule 403 requires consideration of several other factors before otherwise relevant evidence is admitted. Relevant evidence should be withheld from the jury if it would unfairly prejudice, confuse, or mislead the jury, unreasonably delay the trial, or merely be cumulative evidence, and one or all of these problems substantially outweighs the probative value of the evidence.

proached the defendant for money to finance the drug transaction at issue in the case. We ruled that the testimony not only completed the story, but was relevant to show the defendant's motive and his intent in giving the money to the witness. United States v. Scholle, 553 F. 2d at 1121.

Evans maintained that he came to St. Louis to vacation, and that he did not know that his companions, England and Wright, were involved in a marijuana transaction. The testimony of England, similar to the testimony in *Scholle*, was relevant to show Evans' motive for driving to St. Louis and that he intended to participate in the conspiracy.[8] It also indicated the marijuana was not in defendant's car by mistake. All of these are grounds for admitting wrongful act evidence. *See* Fed. R. Evid. 404(b). "In prosecutions for violation of narcotics laws, the defendant's complicity in other similar narcotics transactions may serve to establish intent or motive to commit the crime charged." United States v. Lewis, 423 F. 2d 457, 459 (8th Cir.), *cert. denied*, 400 U. S. 905 (1970). The previous transaction that England and Evans were involved in is similar in many respects. Not only were both involved in each transaction, but Cargile also set up both transactions. Marijuana was purchased both times and in quantities sufficiently large to indicate an intent to distribute it.

Defendant next argues that the evidence of his participation in the summer marijuana purchase did not meet the "clear and convincing" standard. His argument is twofold: (1) that the court failed to determine whether his involvement was clearly and convincingly proved, and (2) that the uncorroborated evidence of England is not clear and convincing.

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[8] Evans argues that the court erred in allowing the government to introduce the prior act evidence in its case in chief. Contrary to Evans' assertion the government is entitled to put this evidence on in anticipation of a defense of lack of intent. United States v. Jardan, 552 F. 2d at 219. The government's anticipation certainly did not unduly prejudice Evans since he did deny any knowledge of or intent to participate in the conspiracy.

While it is true that the court did not make an explicit ruling on whether the evidence of the prior act was clear and convincing this does not end our inquiry. To require an explicit recitation of a "clear and convincing" finding would be a historical step backward to a time when form ruled over substance. Defendant objected to the evidence and voiced his reasons for the objection at bar. We assume that the court is well aware of the standards for admitting prior wrongful act evidence and found, albeit, implicitly that the standards had been met. Although an explicit ruling would simplify our review and is preferable, an implicit finding does not constitute reversible error. Compare United States v. Trevino, 565 F. 2d 1317, 1319 (5th Cir.), *cert. denied,* 435 U.S. 971 (1978).

Moreover, contrary to the second prong of defendant's argument the testimony of England did not require corroboration to satisfy the clear and convincing test. For example in *Jardan* and in *Lewis* we upheld the admission of testimony of a government informant regarding his previous drug transactions with the defendant. In each case no other evidence of the defendant's previous drug activity was offered to corroborate the testimony of the government informer. *United States* v. *Jardan,* 552 F. 2d at 218; United States v. Lewis, 423 F. 2d at 458.[9]

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[9] Other circuits have also accepted the uncorroborated testimony of a witness as sufficient to satisfy the clear and convincing requirement. In *United States* v. *Trevino,* the Fifth Circuit ruled that the testimony of an accomplice did not have to be corroborated to satisfy the requirement. The court reasoned that if such uncorroborated testimony was sufficient to support a conviction then it should also be sufficient to satisfy the lesser, clear and convincing standard. United States v. Trevino, 565 F. 2d at 1319. Likewise, the Seventh Circuit has stated that the "[d]irect testimony of the defendant's participation in the prior schemes is sufficient to meet the clear and convincing standard. . . . The absence of corroboration alone will not render the testimony insufficient." United States v. O'Brien, 618 F. 2d 1234, 1239 (7th Cir. 1980), *cert. denied,* 449 U.S. 858 (1981), (citations omitted).

England's testimony did not necessitate corroboration to go to the jury. His testimony was unambiguous and specific. He testified to when the transaction occurred, what substance was involved, how much of it was involved, and who participated in the transaction. The specificity certainly opened his testimony to rebuttal or challenge if incorrect. The trial court did not err in assuming that the testimony of England satisfied the clear and convincing standard.

Evans finally contends that the prejudicial nature of the evidence substantially outweighed its probative value. He reasons that the evidence lacked probative value because it was not clear and convincing and was highly prejudicial because it tended to confuse the jury. He further argues that the court erred in failing to make a determination of value until the redirect examination of England.

We begin with the last argument first. It is clear from the record that the court performed the necessary balancing of probativeness and prejudice. Evans objected to the prior act testimony when the government first sought to introduce it on direct examination. He called on the court to balance the probative value and prejudicial impact of the proposed testimony. The court listened to Evans' objection and his call for balancing before it ruled in favor of admitting the evidence. The court reasoned that in light of Evans' proposed impeachment of England that the government was allowed to show why England has called Evans about the St. Louis transaction. Also in order to clarify the record the court during redirect again weighed "the pros and cons of admitting this type of testimony." The court's failure to use "magic" words in reaching its decision does not constitute reversible error. *United States* v. *Sangrey,* 586 F. 2d 1312, 1315 (9th Cir. 1978).

Finally, the record does not support defendant's contention that the prejudicial nature of the evidence substantially outweighed its probative value. The record fails to indicate any confusion on the part of the jury, and any confusion that may

have resulted was certainly minimal. Also the evidence on its face was not so inflamatory as to divert the jury's attention from the issues of the case nor was it dwelt upon by government counsel. Furthermore, we have already rejected defendant's other premise that the testimony lacked probative value because it was not clear and convincing. The probative value of England's testimony was not substantially outweighed by any undue prejudice.

The testimony of Edward England satisfied the requirements for admitting prior criminal or wrongful act evidence. Consequently, the trial judge did not abuse his discretion in admitting the testimony.

Affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.